



**Te Tari Ture
o te Karauna**
Crown Law

Non-party disclosure

Te tūhura i hunga kē

As at 1 January 2025

Introduction | Ngā kupu whakataki

1. Defendants in criminal prosecutions are entitled to disclosure; this is an aspect of the right to a fair trial under s 25(a) of the New Zealand Bill of Rights Act 1990. The Criminal Disclosure Act 2008 (CDA) determines what must be disclosed. This includes information held by non-parties to the proceedings.

Glossary | Kuputaka

2. In this guideline:
 - 2.1 A *prosecuting agency* is the agency prosecuting the defendant (on its own behalf or on behalf of the Crown) and holds the file or files relating to the prosecution.
 - 2.2 The *person managing disclosure* is the person designated by the prosecuting agency as being responsible for managing disclosure on its behalf under the CDA.¹ Usually, this will be an investigator (such as the officer in charge), rather than the person who appears in court.
 - 2.3 The *prosecutor* is the person representing the prosecuting agency in the criminal proceeding.
 - 2.4 A *non-party* is a person or organisation that is not the prosecuting agency or prosecutor.

Scope | Te korahi

3. This guideline provides guidance for prosecutors relating to non-party disclosure in criminal proceedings. Guidance for government departments, where they are the non-party from whom disclosure is sought, is not covered by this guideline, and is set out in legally privileged advice from Crown Law.
4. This guideline does not apply to disclosure between the prosecution and defence. This is addressed in the guideline on Disclosure | Te tūhura.

Guideline | Te aratohu

5. All prosecutors involved in non-party disclosure and persons managing disclosure are expected to be familiar with the CDA, any judicial practice notes relating to disclosure, and any legally privileged advice regarding disclosure from Crown Law.

¹ The CDA refers to this person as the “prosecutor”. For consistency with the rest of the guidelines and to aid understanding, this guideline instead uses the term “prosecutor” in the sense that it is most commonly understood; the person who appears in court to conduct the prosecution.

6. Sometimes, a defendant may ask a prosecutor to disclose information that is not part of the investigation file or otherwise held by the prosecutor or the prosecuting agency. If this information is held by a person or organisation that is not a party to the criminal proceedings, prosecutors should generally advise the defendant that they should seek this information from the non-party, and if they decline to release it the defendant may follow the non-party disclosure process in the CDA.

Commentary

Even government departments are non-parties in the context of prosecutions brought by the Crown,² as recognised by the courts³ and provided in the Privacy Act 2020 which restricts the sharing of information between government agencies.

7. There are limited situations where the person managing disclosure should seek the information from the non-party to disclose it. This may include information that is relevant and ought reasonably to be part of the investigation file. In that situation the investigator may decide to seek the information as part of their investigation. If the non-party is unwilling to provide such information the prosecuting agency may decide to use its ordinary enforcement powers, such as obtaining a search warrant or production order, to compel the non-party to provide it.
8. Any information the prosecuting agency obtains is subject to the normal disclosure rules.
9. Most requests should be channelled through the CDA's non-party disclosure mechanism (unless the person managing disclosure has decided to seek the information as part of the investigation). These include requests for:

9.1 Information that is inherently private or sensitive.

Commentary

Examples include requests for psychiatric, medical or counselling notes about an individual, or commercially sensitive information. This ensures that the person or organisation that actually holds the information – and is therefore best placed to advise the court about privacy interests and other public interest considerations – assists the court to determine whether it should be disclosed.

9.2 Information that does not immediately appear relevant.

Commentary

This could be where a request for information is not sufficiently particularised and appears to be a fishing expedition. The non-party disclosure mechanism allows the relevance of the information to be assessed by a court.

² Whether the prosecution is a Crown or non-Crown prosecution.

³ *[XG] v R* [2021] NZCA 4 at [9]. See also *Opetaiā v R* [2020] NZCA 552.

Role of the prosecutor in non-party disclosure applications

10. The prosecutor and non-party have distinct roles in respect of a non-party disclosure application (at both the s 24 stage and at any hearing held under s 27):
 - 10.1 The prosecutor focuses on the relevance of the information to the prosecution and other legal issues such as the potential impact on fair trial rights.
 - 10.2 The non-party focuses on public interest or privacy interests relevant to the disclosure of the particular information. The non-party may also provide information as to the nature and content of the information, which may assist the court to assess its relevance.

Commentary

Where the prosecutor has sufficient knowledge, it may be appropriate for them to address privacy or other statutory interests in non-disclosure (for instance, if the non-party is a private citizen or is unrepresented). However, this should be done cautiously, as the non-party that owns or has custody of the information is generally in a better and more informed position to assist the court to determine whether the information should be disclosed.

11. These distinct roles mean the non-party should be separately represented (if they seek legal representation).

Commentary

The prosecutor should not act for a non-party in a criminal proceeding they are prosecuting. In relation to Crown prosecutions, no one from the prosecuting Crown Solicitor firm should act for the non-party in a non-party application associated with that prosecution. However, a Crown prosecutor may act for a non-party in a prosecution in a different warrant area; or in a non-Crown prosecution, if they have not been instructed to conduct the prosecution. If the non-party is a government department, they must instruct Crown Law to act for them, subject to any authorisation from the Solicitor-General.

Process | Te tukanga

12. The non-party provisions of the CDA do not apply to information held by a prosecutor or prosecuting agency, but disclosure obligations do. Prosecutors and the prosecuting agency should therefore never directly receive the non-party information from the non-party, unless a court has ordered its disclosure or permitted the prosecutor to view the information under s 27(3) of the CDA, or the non-party has consented to release the information.
13. A prosecutor who receives a non-party application under s 24 of the CDA should ensure that:
 - 13.1 The non-party is promptly notified. The prosecutor (or the person managing disclosure) should find out from the non-party whether they hold the information, how much there is, and how long it would take to collate it. The prosecutor should convey this information to the court if the court is not seeking

submissions from the non-party.

Commentary

The defence should make “reasonable efforts” to obtain the information from the person or agency it thinks holds the information *before* making a non-party application. However, this does not always occur in practice. Even where defence counsel *has* previously sought the information, for example by making a request under the Official Information Act 1982, that does not notify the non-party of the s 24 application. The CDA requires the court to serve the application on the non-party only after the application for a hearing is granted under s 25. This means the non-party may not know the process has been commenced. Contacting the non-party early means the prosecutor can obtain information that may assist the court in its determination. It also puts the non-party on notice, so they have more time to prepare if the court does order a hearing. Prosecutors should not assume the non-party is aware of the application. For example, the fact defence counsel has previously requested the information from the non-party (for example, by way of a request under the Official Information Act 1982) does not mean the non-party has been notified of the s 24 application.

- 13.2 The person to whom the information relates is promptly notified. If this person has views about the application, the prosecutor should inform the court. If a hearing is ordered, the court is required to serve the person with the application but this is often overlooked and, in any event, the person should be notified earlier and their views provided to the court in the s 24 process.

Commentary

Sometimes, a person other than the prosecutor may be best placed to make this notification (such as the non-party). The prosecutor and non-party should agree who will make contact, so this is only done once.

14. Prosecutors should notify the non-party immediately if the court orders a hearing.

Commentary

A non-party will need time to collate information, make redactions to protect the privacy of other individuals, or remove irrelevant information ahead of the hearing. Immediate notification allows them to start doing this ahead of the court serving them with the application, which the CDA only requires to be done five working days before the s 27 hearing.

15. Prosecutors do not need to notify the non-party if it is obvious that they already know there will be a hearing (for example, where they have been actively involved in the non-party process).

Contempt applications

16. Section 29(6) of the CDA sets out a specific situation where a prosecutor may make a contempt application relating to a non-party disclosure hearing. Any contempt application should be referred to the Solicitor-General by writing to criminal@crownlaw.govt.nz setting out the reasons why a contempt application should be made.

Other relevant guidelines | Ētahi atu aratohu e whai pānga ana

Disclosure | Te tūhura

The relationship between prosecutors and investigators | Te hononga i waenga i te kaiaru me te kaitūhura